In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1394

LEVI SWINGLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

While serving as president of the First National Bank of Cushing, Oklahoma (A. 165), petitioner made credit available to George Reagin by causing the bank to honor Reagin's checks even though his account did not contain sufficient funds. In most instances the checks paid were never recorded in the bank books by an appropriate debit entry (A. 292–304). By October 1964, the aggregate amount of such checks totaled approximately $295,000. Shortly thereafter, petitioner was replaced as bank president (A. 186–188, 196–197).

Petitioner was convicted by a jury in the United States District Court for the Western District of

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Oklahoma on 44 counts of misapplying the funds of a national bank, in violation of 18 U.S.C. 656 (A. 1–80). He was sentenced to concurrent terms of three years' imprisonment on each count and fined $5,000. The court of appeals affirmed (Pet. App.).

The prosecution was initiated by the presentation of evidence to the grand jury and the return of an indictment. Petitioner moved before trial to have the case remanded to the United States Commissioner with directions to conduct a preliminary hearing to determine the existence of probable cause (A. 82, 93).[1] He argued that a preliminary hearing, or the inspection of the grand jury minutes, was needed "in order to make proper defense, have an opportunity to look into the question of probable cause" (A. 483). The district court denied the motion (A. 490). However, the court allowed pretrial inspection of the grand jury testimony of two witnesses who, petitioner said, would not discuss the case with his counsel (A. 107, 499) and also of bank records and every exhibit which the government offered into evidence (A. 103–107, 114–115, 117–120, 157–161).

Petitioner's sole challenge to his conviction is based upon the district court's denial of his motion for a preliminary hearing. He contends that the failure of the Federal Rules to provide for a preliminary hearing for defendants who are arrested pursuant to original grand jury indictments unconstitutionally

[1] He also moved to dismiss the indictment on the ground, *inter alia*, that its return prior to a preliminary hearing deprived him of the right to inquire into the question of probable cause (A. 81).

discriminates against such defendants because they are denied the opportunity to discover the prosecution's case which is available to defendants who are arrested prior to indictment.

Petitioner's argument rests heavily on the erroneous premise that a purpose of the preliminary hearing is to afford defendants an opportunity to discover the prosecution's case. The function of the preliminary hearing is simply to determine whether there is probable cause to restrain a defendant's liberty until the grand jury can act. Where the grand jury has already determined that a criminal prosecution is warranted, however, the function of the preliminary hearing has been satisfied. A magistrate has no authority to reject the finding of probable cause made by the body which the Constitution has entrusted with that function. To the extent that some discovery of the prosecution's case may be incidental to a preliminary hearing, a defendant, like petitioner, who has not been subjected to restraint until after a grand jury has determined that there is probable cause to hold him, can hardly complain of unlawful discrimination because a defendant who is detained before indictment is accorded a procedure for determining whether that detention is warranted.

We are not aware of any decision holding that a defendant must be accorded a preliminary hearing when he is not arrested until after indictment. Cases in the District of Columbia have suggested that where a defendant has been arrested before indictment and the preliminary hearing has been postponed, a super-

vening indictment does not dispense with the need for a preliminary hearing. Compare *Crump* v. *Anderson*, 352 F. 2d 649 (C.A.D.C.), with *Ross* v. *Sirica*, 380 F. 2d 557 (C.A.D.C.). The other circuits have held that even in that situation a preliminary hearing is not required. See, *e.g.*, *United States* v. *Shyvers*, 385 F. 2d 837 (C.A. 2), certiorari denied, March 25, 1968, No. 1096 Misc., this Term; *United States* v. *Aiken*, 373 F. 2d 294 (C.A. 2), certiorari denied, 389 U.S. 833; *United States* v. *Chase*, 372 F. 2d 453, 467 (C.A. 4); *Byrnes* v. *United States*, 327 F. 2d 825, 834 (C.A. 9), certiorari denied, 377 U.S. 970. In no event does petitioner's thesis find support in the cases.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

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